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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES FOR NORTHEASTERN ILLINOIS UNIVERSITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. 12111-12117, is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING

Petitioner is the United States of America, which intervened in the court of appeals to defend the constitutionality of Congress's abrogation of Eleventh Amendment immunity in the Americans with Disabilities Act of 1990, 42 U.S.C. 12202. Melinda Erickson was the plaintiff in the district court and an appellee in the court of appeals.

Respondent is the Board of Governors of State Colleges and Universities for Northeastern Illinois University.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions involved	2
Statement	2
Reasons for granting the petition	6
Conclusion	7
Appendix A	1a
Appendix B	37a
Appendix C	49a

TABLE OF AUTHORITIES

Cases:

Board of Trustees of the Univ. of Ala. v. *Garrett*, cert. granted, No. 99-1240 (Apr. 17, 2000)	6
Fitzpatrick v. *Bitzer*, 427 U.S. 445 (1976)	4
Puerto Rico Aqueduct & Sewer Auth. v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993)	5

Constitution and statutes:

U.S. Const.:	
Amend. XI	4, 5, 6, 49a
Amend. XIV (Equal Protection Clause)	5, 6, 49a
Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*	2, 4, 5, 6
42 U.S.C. 12101(a)	4, 50a
42 U.S.C. 12101(b)(1)	2, 52a
42 U.S.C. 12101(b)(4)	4, 52a
Tit. I, 42 U.S.C. 12111-12117	4, 50a-72a
42 U.S.C. 12111(2)	4, 54a
42 U.S.C. 12111(5)(A)	4, 54a
42 U.S.C. 12111(7)	4, 56a

Statutes—Continued: Page

42 U.S.C. 12112(a) 4, 58a
42 U.S.C. 12117(a) 4, 71a
Tit. II, 42 U.S.C. 12131-12165 (1994 & Supp. III 1997) 4
Tit. III, 42 U.S.C. 12181-12189 (1994 & Supp. III 1997) 4
Tit. IV, 42 U.S.C. 12201-12213:
42 U.S.C. 12202 ..... 5, 72a
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* 4
Pregnancy Discrimination Act, 42 U.S.C. 2000e(k) 5
Rehabilitation Act of 1973, § 504, 29 U.S.C. 794 (1994 & Supp. IV 1998) 2
28 U.S.C. 2403(a) 5

Miscellaneous:

Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393 (1991) 2
H.R Rep. No. 485, 101st Cong., 2d Sess. (1990):
Pt. 2 2
Pt. 3 2
Pt. 4 2
National Council on Disability:
On the Threshold of Independence (1988) 2
Toward Independence (1986) 2
S. Rep. No. 116, 101st Cong., 1st Sess. (1989) 2
United States Civil Rights Commission, *Accommodating the Spectrum of Individual Abilities* (1983) 2

In the Supreme Court of the United States

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UNITED STATES OF AMERICA, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-36a) is reported at 207 F.3d 945. The opinion of the district court (App., *infra*, 37a-48a) is unreported.

JURISDICTION

The court of appeals entered its judgment on March 27, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set forth at App., *infra*, 49a-72a.

STATEMENT

1. The Americans with Disabilities Act of 1990 (Disabilities Act), 42 U.S.C. 12101 *et seq.*, is a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Based on extensive study and fact-finding by Congress,[1] and Congress's lengthy experience with the analogous nondiscrimination requirement in Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (1994 & Supp. IV 1998), Congress found in the Disabilities Act that:

> (2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

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[1] Fourteen congressional hearings and 63 field hearings by a special congressional task force were held in the three years prior to passage of the Disabilities Act. See S. Rep. No. 116, 101st Cong., 1st Sess. 4-5, 8 (1989); H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at 24-28, 31 (1990); *id.* Pt. 3, at 24-25; *id.* Pt. 4, at 28-29; see also Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393, 393 & nn.1-3 (1991) (listing the individual hearings). Congress also drew upon reports submitted to Congress by the Executive Branch. See S. Rep. No. 116, *supra*, at 6 (citing United States Civil Rights Commission, *Accommodating the Spectrum of Individual Abilities* (1983); National Council on Disability, *Toward Independence* (1986); and National Council on Disability, *On the Threshold of Independence* (1988)); H.R. Rep. No. 485, *supra*, Pt. 2, at 28 (same).

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

* * * * *

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally; [and]

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society[.]

42 U.S.C. 12101(a). Based on those findings, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. 12101(b)(4).

The Disabilities Act targets three particular areas of discrimination against persons with disabilities. Title I, 42 U.S.C. 12111-12117, addresses discrimination by employers affecting interstate commerce; Title II, 42 U.S.C. 12131-12165 (1994 & Supp. III 1997), addresses discrimination by governmental entities; and Title III, 42 U.S.C. 12181-12189 (1994 & Supp. III 1997), addresses discrimination in public accommodations operated by private entities.

This case involves a suit under Title I of the Disabilities Act, which provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. 12112(a). A "covered entity" is defined to include any "person engaged in an industry affecting commerce who has 15 or more employees," 42 U.S.C. 12111(2) and (5)(A), and the term "person" incorporates the definition from Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, which includes States. 42 U.S.C. 12111(7); cf. *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 449 & n.2 (1976). The prohibition on discrimination may be enforced through private suits against public entities. See 42 U.S.C. 12117(a) (incorporating the enforcement provisions of Title VII); cf. *Fitzpatrick*, 427 U.S. at 452. The Act expressly abrogates the States' Eleventh Amendment

immunity. 42 U.S.C. 12202 (a "State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter") (footnote omitted).

2. The plaintiff in this case, Melinda Erickson, was employed for five years in the College of Business and Management at Northeastern Illinois University, rising from secretary to program associate prior to her termination in 1993. App., *infra*, 2a. She filed suit in federal district court alleging that respondent Board of Governors wrongfully terminated her on the basis of disability and a pregnancy-related condition. *Id.* at 38a. Respondent moved to dismiss the Disabilities Act claim on the ground of Eleventh Amendment immunity.[2] The district court denied the motion, holding that the Disabilities Act was an appropriate exercise of Congress's power to enforce the Fourteenth Amendment's Equal Protection Clause and thus validly abrogated respondent's Eleventh Amendment immunity. *Id.* at 37a-48a.

3. Respondent took an interlocutory appeal of the denial of Eleventh Amendment immunity. See *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993). The United States intervened on appeal, pursuant to 28 U.S.C. 2403(a), to defend the constitutionality of the abrogation of immunity. The court of appeals reversed. App., *infra*, 1a-36a.

The court held that Congress clearly intended to abrogate Eleventh Amendment immunity. App., *infra*, 5a (citing 42 U.S.C. 12202). But the court concluded

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[2] Petitioner also alleged a violation of the Pregnancy Discrimination Act, 42 U.S.C. 2000e(k). Respondent did not seek to dismiss that claim on Eleventh Amendment grounds, and thus it was not before the court of appeals. App., *infra*, 37a.

that the Disabilities Act's abrogation was not valid legislation to enforce the Fourteenth Amendment because Congress did not establish a legislative record sufficient to show that the Act was "reasonable prophylactic legislation." *Id.* at 12a.

Judge Diane Wood dissented. App., *infra*, 15a-36a. She would have joined the numerous other courts of appeals that had sustained the Disabilities Act's abrogation of Eleventh Amendment immunity based on the substantial legislative record and tailored statutory scheme. *Id.* at 17a-36a.

REASON FOR GRANTING THE PETITION

On April 17, 2000, this Court granted review in *Board of Trustees of the University of Alabama* v. *Garrett*, No. 99-1240. The question concerning the Disabilities Act's abrogation of Eleventh Amendment immunity raised by this petition is identical to that presented in No. 99-1240. Accordingly, this petition should be held pending the Court's decision in that case.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Board of Trustees of the University of Alabama* v. *Garrett*, No. 99-1240, and disposed of in accordance with the decision in that case.

Respectfully submitted.

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JUNE 2000

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-3614

MELINDA ERICKSON, PLAINTIFF-APPELLEE

AND

UNITED STATES OF AMERICA, INTERVENOR

v.

BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES FOR NORTHEASTERN ILLINOIS UNIVERSITY, DEFENDANT-APPELLANT

[Argued April 27, 1999
Decided March 27, 2000]

Before: ESCHBACH, EASTERBROOK and DIANE P. WOOD, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* We must decide whether Title I of the Americans with Disabilities Act, 42 U.S.C. §§ 12111-17, is an exercise of power under § 5 of the Fourteenth Amendment, which confers authority "to enforce, by appropriate legislation, the provisions of this article." Defendant in this suit is an arm of Illinois and therefore one of the United States for purposes of the Eleventh Amendment. Congress has power under the Commerce Clause to adopt the ADA's rules, but given the Eleventh Amendment a statute that rests only on the Commerce Clause can not authorize private

suits against states in federal court. *Seminole Tribe* v. *Florida*, 517 U.S. 44, 116 S. Ct. 1114, 134 L.Ed.2d 252 (1996). But if § 5 bestows power to adopt the ADA, then private litigation is compatible with the Eleventh Amendment. *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 96 S. Ct. 2666, 49 L.Ed.2d 614 (1976).

Melinda Erickson worked for five years in the College of Business and Management at Northeastern Illinois University, rising from secretary to "program associate." She contends that the University failed to accommodate her efforts to have children. Medical care for her infertility was physically demanding and had side effects. Both the treatment and the circumstances that gave rise to it were emotionally draining. Erickson often did not come to work and was late on days when she did appear. She was fired after she became distraught and stayed home for six working days. Erickson does not contend that the attendance requirements were designed to discriminate against persons with disabilities. Instead she argues that the University should have tolerated absences and tardiness that it would not have condoned from a healthy employee. Invoking the Eleventh Amendment, the University filed a motion to dismiss, which the district court denied. 1998 WL 748277, 1998 U.S. Dist. LEXIS 15779 (N.D. Ill. Oct. 1, 1998). The University's interlocutory appeal is within our jurisdiction, see *Seminole Tribe*, 517 U.S. at 52, 116 S. Ct. 1114, even though the University does not assert sovereign immunity with respect to Erickson's claim under the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k). *Scott* v. *Lacy*, 811 F.2d 1153 (7th Cir. 1987). Cf. *Wisconsin Department of Corrections* v. *Schacht*, 524 U.S. 381, 118 S. Ct. 2047, 141 L.Ed.2d 364 (1998). The United States intervened as a

party in this court to defend the ADA's constitutionality. See 28 U.S.C. § 2403(a).

Three times during the last four Terms, the Supreme Court has addressed the extent of legislative power under § 5. *Kimel* v. *Florida Board of Regents*, — U.S. —, 120 S. Ct. 631, 145 L.Ed.2d 522 (2000); *Florida Prepaid Postsecondary Education Expense Board* v. *College Savings Bank*, 527 U.S. 627, 119 S. Ct. 2199, 144 L.Ed.2d 575 (1999); *Boerne* v. *Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L.Ed.2d 624 (1997). Thrice it has stressed that the language of § 5, which gives Congress the power to "enforce" the Fourteenth Amendment, must be taken seriously. Statutes that create new rights, or expand old rights beyond the Fourteenth Amendment's bounds, do not "enforce" that amendment.

Boerne dealt with the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb to 2000bb-4, a response to *Employment Division* v. *Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L.Ed.2d 876 (1990). *Smith* had held that the Free Exercise Clause of the First Amendment never requires accommodation of religiously inspired practices, so that laws neutral with respect to religion are valid. The RFRA, by contrast, obliged states to accommodate practices associated with religion. The Court held that an accommodation requirement could not be thought to "enforce" a constitutional norm that does not require accommodation. *Florida Prepaid* held that Congress may not use § 5 to abrogate state sovereign immunity on the ground that statutory rights are "property" under the Fourteenth Amendment. *Kimel* held that § 5 does not support the Age Discrimination in Employment Act, 29 U.S.C.

§§ 621-34, because although the ADEA forbids consideration of an employee's age unless age is a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business", § 623(f)(1), the Constitution's own requirement is considerably more lenient. The Equal Protection Clause permits a state to consider a person's age unless age lacks a rational relationship to the state's objective. Most consideration of age in employment therefore is constitutional; but under the ADEA most consideration of age is forbidden; *Kimel* therefore held that the ADEA sets up an independent rule and does not "enforce" the Constitution's rule.

Twenty-three days before the Supreme Court decided *Boerne*, we held in *Crawford* v. *Indiana Department of Corrections*, 115 F.3d 481, 487 (7th Cir. 1997), that § 5 supports Title II of the ADA, which deals with public services. Our opinion analogized the ADA to the ADEA and observed that the latter statute had been applied to states in private litigation. *Kimel* shows that if our analogy to the ADEA is precise, then *Crawford* is no longer authoritative; *Florida Prepaid* and *Boerne* likewise call for a fresh look at the subject. Elsewhere a great deal of ink has been spilled on this question. After *Boerne* but before *Kimel*, panels of five appellate courts held that § 5 supplies the necessary legislative power, though there was one squarely contrary holding by a court *en banc*. Compare *Muller* v. *Costello*, 187 F.3d 298 (2d Cir. 1999); *Coolbaugh* v. *Louisiana*, 136 F.3d 430 (5th Cir. 1998); *Clark* v. *California*, 123 F.3d 1267 (9th Cir. 1997); *Martin* v. *Kansas*, 190 F.3d 1120 (10th Cir. 1999); and *Kimel* v. *Florida Board of Regents*, 139 F.3d 1426, 1433, 1441-44 (11th Cir. 1998), with *Alsbrook* v. *Maumelle*, 184 F.3d 999 (8th Cir. 1999)

(en banc). The fourth circuit is internally divided. Although *Amos* v. *Maryland Department of Public Safety*, 178 F.3d 212 (4th Cir. 1999) (rehearing en banc granted Dec. 28, 1999), holds that private ADA litigation may proceed against state prisons, *Brown v. North Carolina Division of Motor Vehicles*, 166 F.3d 698 (4th Cir. 1999), held that a regulation, based on the ADA, requiring the state's Division of Motor Vehicles to accommodate disabled drivers, is unconstitutional. Recently a divided panel of the ninth circuit disagreed with *Brown*. See *Dare* v. *California Department of Motor Vehicles*, 191 F.3d 1167 (9th Cir. 1999). The Supreme Court's opinion in *Kimel* calls all of these decisions into question, and we think it best to analyze the subject afresh rather than to rehash pre-*Kimel* conclusions in and out of this circuit. Believing that the Supreme Court would tackle the issue before July, the second circuit declined to reconsider *Muller* in light of *Kimel*. See *Kilcullen* v. *New York State Department of Labor*, 205 F.3d 77 (2d Cir. 2000). But settlements have dashed that hope; we therefore undertake independent consideration.

Whether Congress has authorized federal litigation against states is our initial question. *Kimel* answered yes for the ADEA, see 120 S. Ct. at 640-42, and the same answer is appropriate for the ADA. By incorporating 42 U.S.C. § 2000e, the ADA defines persons, and thus employers, to include units of government. 42 U.S.C. § 12111(5)(A), (7). *Fitzpatrick* held that § 2000e is a sufficiently clear statement. Section 12202 adds that "[a] State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter." Finally, just

in case there were doubt, § 12101(b)(4) invokes all possible sources of authority to enact the ADA, "including the power to enforce the fourteenth amendment".

On the question whether a statute such as the ADA enforces the Fourteenth Amendment, *Kimel* establishes two principal propositions. First, because the rational-basis test applies to age discrimination, almost all of the ADEA's requirements stand apart from the Constitution's rule. Most age discrimination is rational, and therefore constitutional, yet the Act forbids it. The ADEA therefore does not "enforce" the Fourteenth Amendment. 120 S. Ct. at 645-48. Second, there is no need for prophylactic rules to catch evasions of the rational-basis test by state governments. Congress did not find that such a problem exists, and there is no evidence of one. The ADEA therefore cannot be understood as enforcement legislation. 120 S. Ct. at 648-50. Both of these propositions are true of the ADA as well—indeed, the ADA is harder to conceive as "enforcement" of the Fourteenth Amendment than is the ADEA. Under the ADEA employers must *ignore* age but are free to act on the basis of attributes such as strength, mental acuity, and salary that are related to age. *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 113 S. Ct. 1701, 123 L.Ed.2d 338 (1993). In other words, the ADEA forbids disparate treatment but not disparate impact. *EEOC* v. *Francis W. Parker School*, 41 F.3d 1073, 1077 (7th Cir. 1994); *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120 (7th Cir. 1994). Likewise with the Constitution and most other employment-discrimination laws. *E.g.*, *Troupe* v. *May Department Stores Co.*, 20 F.3d 734 (7th Cir. 1994) (the Pregnancy Discrimination Act does not require accommodation). Title I of the ADA, by contrast, requires employers to con-

sider and to accommodate disabilities, and in the process extends beyond the anti-discrimination principle. 42 U.S.C. § 12112(b)(5)(A), (6) (defining failure to accommodate, and criteria with disparate impacts, as "discrimination"). (Some other titles of the ADA are less expansive. See *Doe* v. *Mutual of Omaha Insurance Co.*, 179 F.3d 557 (7th Cir. 1999). Our concern in this case is Title I, and unelaborated references to "the ADA" are to Title I.)

A rational-basis test applies to distinctions on the ground of disability, just as to distinctions on the ground of age. *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432, 439-42, 105 S. Ct. 3249, 87 L.Ed.2d 313 (1985); *Heller* v. *Doe*, 509 U.S. 312, 319-21, 113 S. Ct. 2637, 125 L.Ed.2d 257 (1993); *United States* v. *Harris*, 197 F.3d 870, 873-76 (7th Cir. 1999). Consideration of an employee's disabilities is proper, so far as the Constitution is concerned. See *Cleburne*, 473 U.S. at 444, 105 S. Ct. 3249 ("governmental consideration of those differences in the vast majority of situations is not only legitimate but also desirable"). Consider this from the perspective of a university such as our defendant. A would-be professor who is not in the top 1% of the population in mental acuity is not apt to be a good teacher and scholar. Likewise it is rational for a university to favor someone with good vision over someone who requires the assistance of a reader. The sighted person can master more of the academic literature (reading is much faster than listening), improving his chance to be a productive scholar, and also is less expensive (because the university need not pay for the reader). An academic institution that prefers to use a given budget to hire a sighted scholar plus a graduate teaching assistant, rather than a blind scholar plus a

reader, has complied with its constitutional obligation to avoid irrational action. But it has *not* complied with the ADA, which requires accommodation at any cost less than "undue hardship". 42 U.S.C. § 12112(b)(5)(A), § 12111(10). How the "undue hardship" defense under the ADA compares with the "bona fide occupational qualification" defense under the ADEA is an interesting question, but not one we need pursue: both statutes presumptively forbid consideration of attributes that the Constitution permits states to consider, and then (like the RFRA) require the state to carry a burden of persuasion in order to take the characteristic into account. As in *Kimel*, the fact that the law has made adverse action based on a characteristic "prima facie unlawful" shows the extent of its departure from the Constitution's own rule. 120 S. Ct. at 647. Like the ADEA, the ADA "prohibits very little conduct likely to be held unconstitutional," *id.* at 648.

The ADA's main target is an employer's rational consideration of disabilities. Rational discrimination *by definition* does not violate a constitutional provision that condemns only irrational distinctions based on disabilities. Congress has ample power under the Commerce Clause to forbid rational discrimination, which may bear especially heavily on a class of persons who suffer from diminished human (and often financial) capital. But to say that in devising these new rules Congress is just "enforcing" a substantive command present in § 1 of the Fourteenth Amendment since 1868 would be a legal fiction. *Boerne*, *Florida Prepaid*, and *Kimel* hold that fictions do not support legislation under § 5.

One way to distinguish the ADA from the ADEA would be to emphasize a remark in *Kimel* that "[o]ld age . . . does not define a discrete and insular minority because all persons, if they live out their normal life spans, will experience it." 120 S. Ct. at 645. The argument would continue that many disabilities are immutable; few people born blind acquire vision later. We do not read the Court's observation in *Kimel* as distinguishing among characteristics that are subject to rational-basis review; instead the Court offered the observation as one reason why earlier cases had applied the rational-basis test to age. Because *Cleburne* held that the rational-basis test likewise governs disabilities, the reasoning behind that opinion need not come back into consideration. We know from *Cleburne* that rational distinctions based on disabilities comport with the Constitution. What is more, many disabilities come and go, or progress with time. Beethoven did not become deaf, or Milton blind, until middle age. Erickson's medical problem affected her for a number of years but not for a lifetime (if only because medical treatment may have succeeded, or because after menopause it would have lost significance). One can imagine an argument under § 5 for a federal law dealing with discrimination against persons with life-long disabilities, but the ADA is not such a law—not only because it extends beyond permanently disabled persons, but also because "discrimination" as the ADA defines it, see § 12112(b), has little in common with "discrimination" in constitutional law.

To see this, consider the role of intent. When a state law or practice does not expressly concern a particular characteristic (such as race, sex, age, or disability), but has a disparate impact on persons with that characteri-

stic, the plaintiff in constitutional litigation must establish that the state *intends* to discriminate on the basis of that characteristic. See, *e.g.*, *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 99 S. Ct. 2282, 60 L.Ed.2d 870 (1979) (sex); *Washington* v. *Davis*, 426 U.S. 229, 96 S. Ct. 2040, 48 L.Ed.2d 597 (1976) (race). Things are otherwise under the ADA, which not only demands accommodation (which forces the employer to consider, rather than ignore, disabilities) but also prohibits any rule or practice that has a disparate impact, unless the rule is "job-related for the position in question and is consistent with business necessity". 42 U.S.C. § 12112(b)(6). See *Washington* v. *Indiana High School Athletic Ass'n*, 181 F.3d 840 (7th Cir. 1999) (under the ADA the plaintiff need not show that the governmental body intended to discriminate on account of disability). Cases such as *Feeney* and *Davis* hold that the Equal Protection Clause does not forbid laws and practices that have a disparate impact; but the ADA does forbid them.

By requiring that employers accommodate rather than disregard disabilities, the ADA is a cousin to the RFRA. *Smith* held that demands for accommodation and claims of disparate impact have no constitutional footing under the Free Exercise Clause; it takes express or intentional discrimination to violate that provision. See also *Church of the Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U.S. 520, 113 S. Ct. 2217, 124 L.Ed.2d 472 (1993). Congress then enacted the RFRA, which requires every unit of government to justify any law or practice that burdens a person's exercise of religion, "even if the burden results from a rule of general applicability". 42 U.S.C. § 2000bb-1(a). This requires a state to accommodate religiously motivated

behavior unless it can show a "compelling" reason for neutrality between religious and secular conduct. *Boerne* responded that Congress may not redefine the constitutional rule under the rubric of "enforcement."

What the RFRA did for religion, the ADA does for disabilities. In neither situation does the Constitution forbid neutral laws or practices that create disparate impacts; in neither situation does the Constitution require accommodation. Both the RFRA and the ADA replace the Constitution's approach with a prohibition of disparate impact and jettison neutrality in favor of accommodation. The RFRA's demand for a "compelling governmental interest", 42 U.S.C. § 2000bb-1(b)(1), made it harder for a government to prevail than do the ADA's requirements (job-relatedness, business necessity, and undue hardship), but there is a countervailing difference that makes the ADA the more adventuresome. The Free Exercise Clause forbids all intentional discrimination against religious practices; the Equal Protection Clause has no similar rule about disabilities. Rational discrimination against persons with disabilities is constitutionally permissible in a way that rational discrimination against religious practices is not. This makes the ADA harder than the RFRA to justify under § 5, for "[i]t is precisely in a close case that the independent judgment of Congress on a constitutional question should make a difference." Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 Harv. L. Rev. 153, 155 (1997). See also Stephen L. Carter, *The Morgan "Power" and the Forced Reconsideration of Constitutional Decisions*, 53 U. Chi. L. Rev. 819 (1986). Some of the Justices and several careful scholars believe that the rule of decision in the RFRA is the Constitution's

own. See *Boerne*, 521 U.S. at 544, 117 S. Ct. 2157 (O'Connor, J., dissenting), 521 U.S. at 565, 117 S. Ct. 2157 (Souter, J., dissenting). Others who support the majority position in Smith acknowledge that the question is difficult. See generally Symposium, *Reflections on City of Boerne* v. *Flores*, 39 William & Mary L. Rev. 597 (1998). But *no one* believes that the Equal Protection Clause establishes the disparate-impact and mandatory-accommodation rules found in the ADA. The statute is outside the boundaries of constitutional discourse in a way that the RFRA was not. If the RFRA and the ADEA exceed the § 5 power, then so does the ADA—at least to the extent it extends beyond remedies for irrational discrimination.

Well, then, can the ADA be sustained as reasonable prophylactic legislation? Because the ADA requires accommodation, forbids practices with disparate impact, and disregards the employer's intent, it is harder than the ADEA to characterize as a remedial measure. The ADEA was a real anti-discrimination law; unless age was held against the employee, there was no violation. The ADA goes beyond the anti-discrimination principle, a step that requires reason to think that *only* by going to these lengths is it possible to implement the core constitutional rule. Yet just as for the ADEA, Congress did not find that states have adopted clever devices that conceal irrational discrimination. The legislative findings in 42 U.S.C. § 12101 contain not a word about state governments. Congress did find that persons with disabilities have been discriminated against; it found the same in the ADEA for age. What it did *not* find is that the practices labeled "discrimination" are *irrational* (as that term works under the Equal Protection Clause) or that states are major offenders—a

critical inquiry not only under *Kimel* but also under *Florida Prepaid*. Instead, Congress used the word "discrimination" in § 12101, and Committees of Congress used that word in the legislative history, to refer to any disadvantage that accompanies a disability. For example, the statement in H.R. Rep. No. 101-485(II), 101st Cong. 2d Sess. 37 (1990), U.S. Code Cong. & Admin. News at 303, 319, that "inconsistent treatment of people with disabilities by different State or local government agencies is both inequitable and illogical for a society committed to full access for people with disabilities" means only that different public bodies treated persons differently, because the Rehabilitation Act applied to some persons but not others; it does not mean that either treatment was unconstitutional. "Inconsistent" is not a synonym for irrational—especially not when it was a federal statute that induced the inconsistency on which the Committee remarked.

Just as in *Kimel*, legislative statements about discrimination consist "almost entirely of isolated sentences clipped from floor debates and legislative reports." 120 S. Ct. at 649. These snippets use the word "discrimination" in a way that fails to distinguish between rational distinctions (which the Constitution allows) and irrational ones (which it forbids). The sort of findings that would permit adoption of the ADA as a precautionary measure, after the fashion of the Voting Rights Act, see *South Carolina* v. *Katzenbach*, 383 U.S. 301, 86 S. Ct. 803, 15 L.Ed.2d 769 (1966), must establish that states have been able to disguise forbidden discrimination as the permissible kind. Nothing in the legislative findings, or the debates preceding the ADA's adoption, shows (or even asserts) that state governments engaged in deception that prevented victims

of irrational discrimination from obtaining a remedy. Findings underlying Title VII were more substantial, and because employers frequently disguised their resort to racial criteria it is easier to justify the disparate-impact features of Title VII as remedial measures. *In re Employment Discrimination Litigation*, 198 F.3d 1305 (11th Cir. 1999), concludes accordingly that § 5 supports the disparate-impact rules under Title VII, as well as the disparate-treatment rules addressed in *Fitzpatrick* v. *Bitzer*. We leave that question for another day and hold only that the background of the ADA does not meet the standards that *Boerne* and *Kimel* set for using § 5 to enact prophylactic legislation.

From all of this it follows that the ADA does not "enforce" the Fourteenth Amendment, and from *Seminole Tribe* it follows that the Eleventh Amendment and associated principles of sovereign immunity block private litigation against states in federal court. But Northeastern Illinois University must understand the limits of this holding. The ADA is valid legislation, which both private and public actors must follow. Even if the Supreme Court should overrule *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S. Ct. 1005, 83 L.Ed.2d 1016 (1985), and return to the view of *National League of Cities* v. *Usery*, 426 U.S. 833, 852, 96 S. Ct. 2465, 49 L.Ed.2d 245 (1976), that laws resting only on the Commerce Clause cannot "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions," the University still would be bound by the ADA, for running a university is no more a core governmental function than is running a railroad. See *United Transportation Union* v. *Long Island R.R.*, 455

U.S. 678, 102 S. Ct. 1349, 71 L.Ed.2d 547 (1982). Like most railroads, most universities in the United States are private. All our holding means is that *private* litigation to enforce the ADA may not proceed in *federal* court. Erickson may repair to Illinois court—for although states may implement a blanket rule of sovereign immunity, see *Alden* v. *Maine*, 527 U.S. 706, 119 S. Ct. 2240, 144 L.Ed.2d 636 (1999), Illinois has not done this. Having opened its courts to claims based on state law, including its own prohibition of disability discrimination by units of state government, see 775 ILCS 5/1-102, 5/2-101(B)(1)(c), Illinois may not exclude claims based on federal law. *Howlett* v. *Rose*, 496 U.S. 356, 367-75, 110 S. Ct. 2430, 110 L.Ed.2d 332 (1990); *FERC* v. *Mississippi*, 456 U.S. 742, 759-69, 102 S. Ct. 2126, 72 L.Ed.2d 532 (1982); *Testa* v. *Katt*, 330 U.S. 386, 67 S. Ct. 810, 91 L.Ed. 967 (1947). Moreover, the United States may enforce the ADA against the University and other state actors through federal litigation. *West Virginia* v. *United States*, 479 U.S. 305, 311 n. 4, 107 S. Ct. 702, 93 L.Ed.2d 639 (1987). But Erickson has not enlisted the United States as her champion (its intervention was for the purpose of defending Erickson's right to sue in her own name), so this suit belongs in state court.

REVERSED

DIANE P. WOOD, *Circuit Judge*, dissenting.

The Americans with Disabilities Act, or ADA, 42 U.S.C. § 12111 *et seq.*, stands at the intersection of two lines of cases that address Congress's power under section 5 of the Fourteenth Amendment to abrogate the Eleventh Amendment immunity of the states. Laws that fall within the section 5 power may abrogate the

States' Eleventh Amendment immunity from suit, if Congress has made its intent to abrogate "unmistakably clear" in the language of the statute. See *City of Boerne* v. *Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L.Ed.2d 624 (1997); *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 242, 105 S. Ct. 3142, 87 L.Ed.2d 171 (1985). When the question has been whether Title VII of the Civil Rights Act represents a valid use of Congress's power under section 5, courts have answered in the affirmative. See, *e.g.*, *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 456-57, 96 S. Ct. 2666, 49 L.Ed.2d 614 (1976); *In re Employment Discrimination Litigation Against State of Alabama*, 198 F.3d 1305, 1324 (11th Cir. 1999) (finding that disparate impact analysis is a valid prophylactic measure and thus that this aspect of Title VII, equally with the disparate treatment branch, is a valid exercise of section 5 power).

On the other hand, the Supreme Court has recently ruled that the Age Discrimination in Employment Act, or ADEA, 29 U.S.C. §§ 621-34, exceeded Congress's section 5 powers and thus could not as a matter of law override the State's Eleventh Amendment immunity. *Kimel* v. *Florida Board of Regents*, — U.S. —, 120 S. Ct. 631, 145 L.Ed.2d 522 (2000). The question before us today, as the majority recognizes, is which line of authority to apply to yet another statute, the ADA. This is plainly a delicate and difficult issue, as the Supreme Court itself appeared to have signaled when it granted certiorari in *Florida Dept. of Corrections* v. *Dickson*, —U.S. —, 120 S.Ct. 976, ____ L.Ed.2d ____ (2000), and in *Alsbrook* v. *Arkansas*, — U.S. —, 120 S. Ct. 1003, 145 L.Ed.2d 947 (2000), two cases presenting precisely the problem before us now. The Court dismissed those two petitions under S. Ct. Rule 46.1, and

so it will not be considering the issue during the present Term. See *Florida Department of Corrections* v. *Dickson*, — U.S. —, 120 S. Ct. 1236, 145 L.Ed.2d 1131 (2000), and *Alsbrook* v. *Arkansas*, — U.S. —, 120 S.Ct. 1265, — L.Ed.2d — (2000). We must therefore decide this case without the prospect of immediate guidance from Washington. For the reasons I explain below, I conclude that Title I of the ADA falls within Congress's section 5 powers under the principles the Court has articulated. I would therefore find that Erickson is entitled to bring her ADA suit against Northeastern Illinois University consistently with the Eleventh Amendment, and I respectfully dissent.

I

Although the literal language of the Eleventh Amendment addresses only the question of the extent of the judicial power of the United States (which "shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State," U.S. Const. amend. XI), the Supreme Court has held in a recent line of decisions that the meaning of this part of the Constitution is not limited to the precise words of the text. Instead, the Eleventh Amendment reflects the structural fact that each state is a sovereign entity within the federal system, and as such, each state enjoys sovereign immunity from suit except insofar as its immunity has legitimately been curtailed. See *Seminole Tribe* v. *Florida*, 517 U.S. 44, 54, 116 S. Ct. 1114, 134 L.Ed.2d 252 (1996); *Alden* v. *Maine*, 527 U.S. 706, 119 S. Ct. 2240, 2253-54, 144 L.Ed.2d 636 (1999); *Florida Prepaid Postsecondary Education Expense Board* v. *College Savings*

Bank, 527 U.S. 627, 119 S. Ct. 2199, 2204, 144 L.Ed.2d 575 (1999).

There are a number of ways in which sovereign immunity can be overcome consistently with the law: the state might consent to suit; to much the same effect, it might choose to waive its sovereign immunity; or Congress might enact legislation that abrogates the state's immunity.[1] Only the last of those options is relevant here. Abrogation is constitutionally possible only in narrow circumstances. First, Congress must

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[1] The extent of the protection from suit that results from a finding of sovereign immunity is also an important question, because, at least in certain contexts, sovereign immunity is qualified rather than absolute. See, *e.g.*, the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602, 1605. Despite the exchange between the majority and dissenters in *College Savings Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 119 S. Ct. 2219, 2230-31, 2235-37, 144 L.Ed.2d 605 (1999), on the significance of market participation for sovereign immunity purposes, there remains some tension in the Supreme Court's cases on this point. See *Reno* v. *Condon*, — U.S —, 120 S. Ct. 666, 145 L.Ed.2d 587 (2000) (finding the Driver's Privacy Protection Act to be a valid exercise of Congress's Commerce Clause power, and non-violative of state sovereignty under both the Tenth and Eleventh Amendments, because it regulated the state's market activities); *California* v. *Deep Sea Research*, 523 U.S. 491, 506-07, 118 S. Ct. 1464, 140 L.Ed.2d 626 (1998) (finding that, in determining whether sovereign immunity applies to states, the Court looks at whether sovereign immunity would apply to the federal government, because "this Court has recognized a correlation between sovereign immunity principles applicable to States and the Federal government," and at whether sovereign immunity would apply to a foreign government). Although I recognize that the Supreme Court may ultimately have more to say on the subject, I am assuming here, consistently with *College Savings* and *Kimel*, that the commercial character of the operation of a state university system is not enough to qualify the state's Eleventh Amendment immunity.

make its intent to abrogate "unmistakably clear" in the language of the statute. See *Kimel*, 120 S. Ct. at 640 (citing *Dellmuth v. Muth*, 491 U.S. 223, 228, 109 S. Ct. 2397, 105 L.Ed.2d 181 (1989), and quoting from *Atascadero*, 473 U.S. at 242, 105 S. Ct. 3142). Second, it must act pursuant to a valid grant of constitutional power. *Kimel*, 120 S. Ct. at 642; *City of Boerne*, 521 U.S. 507, 519, 117 S. Ct. 2157; *Green v. Mansour*, 474 U.S. 64, 68, 106 S. Ct. 423, 88 L.Ed.2d 371 (1985). Here, everyone agrees that the only source of congressional power at issue is section 5 of the Fourteenth Amendment. *Cf. Florida Prepaid*, 119 S. Ct. at 2205.

In *Kimel*, the Court found that the ADEA satisfied the "clear statement" requirement for abrogation. 120 S. Ct. at 640-42. The majority finds, and I agree, that the same is true of the ADA. Unlike the majority, however, I also conclude that Congress legitimately used its power under section 5 of the Fourteenth Amendment when it made the ADA applicable to the states.

As I have already noted, we know that Title VII represents a valid exercise of Congress's section 5 power to abrogate the Eleventh Amendment immunity of the states, but the ADEA does not. The *Kimel* Court made the latter finding because, following *City of Boerne*, it concluded that the ADEA was a measure that went beyond either enforcement of the Fourteenth Amendment or valid prophylactic measures designed to prevent violations of the Constitution. See *Kimel*, 120 S. Ct. at 645, 648-49. In *Florida Prepaid*, the Court explained the difference between valid efforts to exercise

section 5 powers and those that go beyond the constitutional limits as follows:

> While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.

119 S. Ct. at 2205 (quoting from *City of Boerne*, 521 U.S. at 519-20).

While the majority appears to concede that *Kimel* should guide our decision with respect to the ADA, its reading of *Kimel* overlooks important qualifications on that decision. The majority sees *Kimel* as a case holding that virtually all discrimination that is subject to rational basis review for equal protection clause purposes is outside the scope of Congress's section 5 powers. *Ante*, at 5. I find no hint of this in *Kimel*; to the contrary, after recognizing that age discrimination is subject to rational basis review, the Court took pains to analyze the ADEA in detail before finding that it cannot be sustained against the states as a valid exercise of the section 5 powers. That analysis would have been entirely beside the point if the mere fact of rational basis review was enough to decide the case. Furthermore, the majority here, in rejecting the idea that the accommodation provisions of the ADA could be sustained under section 5 (*ante* at 7) ignores the express holding of *Kimel* that "we have never held that section 5 precludes Congress from enacting reasonably

prophylactic legislation." 120 S. Ct. at 648. Last, the majority appears to hold that virtually all antidiscrimination statutes that focus on disparate impact, rather than intentional disparate treatment, exceed Congress's section 5 powers. In so doing, it has created a square conflict with the Eleventh Circuit's decision in *Employment Discrimination, supra*, 198 F.3d at 1324.

Kimel provides the analytical approach for assessing whether a statute addressing discrimination is a valid exercise of the section 5 power. Looking at both the legislative record and the language of the pertinent statute, the *Kimel* Court first asked whether the substantive requirements of the statute were proportionate to any unconstitutional conduct that the statute could have targeted. 120 S. Ct. at 645. It looked to earlier decisions that had considered the constitutional implications of age discrimination and found it significant that all had upheld age distinctions against constitutional challenges. See *Gregory v. Ashcroft*, 501 U.S. 452, 111 S. Ct. 2395, 115 L.Ed.2d 410 (1991); *Vance* v. *Bradley*, 440 U.S. 93, 99 S. Ct. 939, 59 L.Ed.2d 171 (1979); *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S. 307, 96 S. Ct. 2562, 49 L.Ed.2d 520 (1976) (per curiam). Second, it consulted the legislative record to see if it revealed either (1) a pattern of age discrimination committed by the states or (2) "any discrimination whatsoever that rose to the level of constitutional violation." 120 S. Ct. at 648-50. Finding neither element present, the Court concluded that Congress did not in the ADEA validly abrogate the states' sovereign immunity.

Following this roadmap, one can see that the ADA differs critically from the ADEA in the areas the Su-

preme Court deemed significant. The first question concerns the level of constitutional protection the Supreme Court has recognized in prior cases for persons with disabilities. With that standard in mind, the next question is whether the ADA represents a proportionate response to the likelihood of constitutional violations.

The leading case on the equal protection dimensions of disability discrimination is *City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432, 105 S. Ct. 3249, 87 L.Ed.2d 313 (1985). Although, as the majority observes, the Court ultimately decided that rational basis review was proper for the ordinance in that case, the majority finds the Court's reasoning to be irrelevant, *ante* at 6. The majority also pays no heed to the fact that the Court struck down the *Cleburne* ordinance because it unconstitutionally discriminated against the mentally retarded (clearly illustrating that legislation prohibiting discrimination with respect to a category that receives rational basis review might indeed be enforcing the Constitution). I cannot dismiss either aspect of *Cleburne* so readily.

The specific question before the Court in *Cleburne* was whether a local ordinance that required a special use permit for a home for the mentally retarded, but that imposed no such requirement for many similar uses, violated the equal protection rights of the mentally disabled. The Court held that mental retardation should not be treated as a "quasi-suspect classification" for equal protection purposes, but it nevertheless found that the ordinance failed rational basis scrutiny, because the permit requirement "rest[ed] on an irrational prejudice against the mentally retarded. . . ."

Cleburne, 473 U.S. at 450, 105 S. Ct. 3249.[2] In coming to that conclusion, the Court subjected the city's proffered reasons in defense of the ordinance to careful scrutiny, even while it avoided introducing undue rigidity into its analysis by using terms like "suspect" or "quasi-suspect" classifications—terms which the Court later pointed out had sometimes given rise to the erroneous notion that scrutiny that was strict in theory was often fatal in fact. See *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 237, 115 S. Ct. 2097, 132 L.Ed.2d 158 (1995).

Both the rationale of *Cleburne* and the nature of disability discrimination itself, as outlined in the congressional findings and legislative history of the ADA, highlight important differences between disability and age as bases for differential treatment, and they reveal, contrary to the majority's surprising suggestion, that the ADA is indeed a statute designed to prohibit irrational discrimination.

As the *Kimel* Court observed, older persons "have not been subjected to a history of purposeful unequal treatment." 120 S. Ct. at 645 (citing *Murgia*, 427 U.S.

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[2] This implies a more exacting test for rationality than the majority finds in *Cleburne*, *ante* at 6-7. The majority goes on to advance the astonishing propositions that it would be rational for a university to conclude that anyone not in the top 1% of the population is not apt to be a good teacher and scholar, or that it would be rational to refuse to hire a blind professor because she could not master material as fast as her sighted colleagues. Such a view flies in the face of evidence about the accomplishments of the visually impaired; it assumes rationality in the process of choosing who exactly falls within the top 1% of the population; and it illustrates exactly the kind of stereotyped thinking that the ADA was designed to combat.

at 313, 96 S. Ct. 2562, quoting *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U.S. 1, 28, 93 S. Ct. 1278, 36 L.Ed.2d 16 (1973)). In contrast, Congress found in the ADA that disabled persons have been "subjected to a history of purposeful unequal treatment," "in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. § 12101. Second, harking back to the well known idea in *United States* v. *Carolene Products*, 304 U.S. 144, 152-53 n. 4, 58 S. Ct. 778, 82 L.Ed. 1234 (1938), in no meaningful sense of the term can the elderly be regarded as a "discrete and insular minorit[y]"; to the contrary, as *Kimel* notes, "all persons, if they live out their normal life spans, will experience [old age]." 120 S. Ct. at 645. This is a strong reason to believe that the normal political processes are adequate to protect the interests of the elderly and that they will not be singled out for unconstitutionally discriminatory treatment.

The disabled stand in a distinctly different position. Not everyone is or will become disabled. And the fact that some disabilities arise later in life and some do not persist for a lifetime does not make them the equivalent of the inexorable aging process. The point is that Congress found that those who are disabled will suffer during the time they are disabled from the same invidious discrimination that has haunted racial minorities and women. The ADA reflects Congress's finding that society has the ability to, and has historically, "tended to isolate and segregate individuals with disabilities." 42 U.S.C. § 12101.

There are other reasons as well to conclude that the ADA is a permissible exercise of Congress's section 5 power. Apart from the salient differences between age and disability as bases for categorization, the two statutes fare quite differently under the proportionality analysis required by *Boerne* and *Kimel*. The broad sweep of the ADEA caused the Supreme Court to find that it was not a proportional response to the problem of age discrimination. The ADEA prohibits all employment discrimination on the basis of age against persons in the protected class (those above the age of 40). 29 U.S.C. § 623(a)(1). The only tempering of this rule appears in the statutory rules allowing an employer to justify age-based distinctions if it shows either a substantial basis for believing that all or nearly all employees above a given age lack the qualifications required for the position or that reliance on the age classification is necessary because individual testing for qualifications is highly impractical. *Kimel*, 120 S. Ct. at 647 (citing *Western Air Lines* v. *Criswell*, 472 U.S. 400, 422, 105 S. Ct. 2743, 86 L.Ed.2d 321 (1985)). The EEOC's implementing regulations, as well as cases decided under the ADEA, make it clear that these exceptions were intended to be narrow ones. See 29 C.F.R. § 1625.6(a); see also *Western Air Lines*, 472 U.S. at 422, 105 S. Ct. 2743.

The ADA adopts a more nuanced approach to the problem of disability discrimination. An employer is entitled to treat a disabled person differently—indeed, even to deny employment to the person on that basis—if there are no reasonable accommodations that will permit the individual to do the job and she cannot handle the job without accommodations. 42 U.S.C. § 12113. See, *e.g.*, *Stewart* v. *County of Brown*, 86 F.3d

107, 112 (7th Cir. 1996); *Pond* v. *Michelin North America, Inc.*, 183 F.3d 592, 596 (7th Cir. 1999); *Sieberns* v. *Wal-Mart Stores, Inc.*, 125 F.3d 1019, 1022 (7th Cir. 1997). Thus, while an employer discriminating on the basis of age must demonstrate that it would be "highly impractical" not to do so, an employer making distinctions on the basis of disability need only show that "reasonable steps" of accommodation, such as moifying work schedules, training materials, facilities, or policies, will not work. See 42 U.S.C. §§ 12113, 12111. The incorporation of a reasonableness standard in the duty to accommodate, which itself modifies the duty not to discriminate on the basis of disability, is essentially a legislative incorporation of the proportionality test required under the Constitution. It also illustrates, contrary to the majority's suggestion, that the duty to accommodate is not a command to give "special" treatment; instead, it spells out the way that discrimination is to be avoided. I would therefore find that the ADA meets the first part of the *Kimel* analysis.

The second question under *Kimel* requires us to consider whether the legislative record reveals either a pattern of age discrimination committed by the states or "any discrimination whatsoever that [rises] to the level of constitutional violation." 120 S. Ct. at 649. Here, although the evidence is stronger on the second point than the first, the record shows both kinds of disability discrimination.

With respect to the first question (*i.e.* legislative findings pertaining specifically to state behavior), the legislative record is admittedly sparse. Nevertheless, the House Report notes that "inconsistent treatment of people with disabilities by different state or local

government agencies is both inequitable and illogical." H.R. Rep. No. 101-485(II), U.S. Code Cong. & Admin. News at 319. More importantly, the express congressional findings with respect to pervasive discrimination address many areas that are controlled to a significant degree by state and local governments. For example, Congress identified discrimination in education as a particular problem. See 42 U.S.C. § 12101(3). Education in this country is overwhelmingly an enterprise of state and local government.[3] Another sector singled out in the statute was health services, see 42 U.S.C. § 12101(3), in which state and local governments also play a powerful role.[4] The story is similar for transportation, which is also mentioned in § 12101(3).[5] Congress's specific attention to sectors with such a substantial state and local governmental presence indicates that it knew that government action at the state level was an important part of the problem it was addressing.

The other evidence the *Kimel* Court found lacking for the ADEA—a record of discrimination that reveals constitutional violations—is present in abundance for the ADA. It would be hard to imagine greater scrutiny

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[3] A 1995 study by the Department of Education showed that 90% of elementary and secondary education in the United States is public—only 10% of students are enrolled in private schools. See <*http://www.ed.gov*>.

[4] Together, state and local governments were responsible for 12.7% of the United States' health expenditures in 1998, while private individuals and corporations were responsible for only 54% of those costs. See < *http://www.hcfa.gov*>.

[5] Government as a whole paid about 50% of transportation costs in the United States in 1996, with state and local governments covering about 60% of those costs, or 34.5% of the total. See <*http://www.bts.gov*>.

than Congress gave to the harm caused by disability discrimination when it passed the ADA. Its findings explain in painstaking detail the extent of the evil. See 42 U.S.C. § 12101.[6] We give congressional findings

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[6] Congress found that:

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society,

substantial deference, because Congress "is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions." *Turner Broadcasting System, Inc.* v. *F.C.C.*, 520 U.S. 180, 195, 117 S. Ct. 1174, 137 L.Ed.2d 369 (1997). This is the legislative task the Supreme Court contemplated in *Cleburne*, where it held that the way disabled people are "to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary." *Cleburne*, 473 U.S. at 442-43, 105 S. Ct. 3249.

The ADA's legislative findings distinguish the ADA from both the ADEA and RFRA, the statute before the Court in *City of Boerne*. Like the ADEA and unlike the ADA, Congress did not make findings in the RFRA about the seriousness or scope of discrimination against religious persons. See 42 U.S.C. §§ 2000bb to 2000bb-4. As I have already noted, in the ADEA Congress never identified "any discrimination whatsoever that rose to

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based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals, and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

42 U.S.C. § 12101.

the level of constitutional violation." *Kimel*, 120 S. Ct. at 649. The only evidence the *Kimel* Court found showing the harm at which the ADEA was aimed was a few "isolated sentences clipped from floor debates and legislative reports." *Id.* When formulating the ADA, in contrast, Congress compiled an immense legislative record. It examined all this evidence and found that "[t]he severity and pervasiveness of discrimination against people with disabilities [was] well documented." H.R. 101-485(II), U.S. Code Cong. & Admin. News at 312. This factor therefore points toward a conclusion that the legislative basis for a valid exercise of Congress's section 5 powers is present for the ADA, even though it was not for the ADEA or RFRA.

Before leaving this subject, it is important to note that the majority has elevated a single point in the legislative history to dispositive significance: the absence of a statement somewhere to the effect that "we are passing this law because we need to correct discrimination on the basis of disability committed by the states." I see nothing in *Kimel* that gives such primacy to this single point. Combining the explicit coverage of sectors in which the states are the principal actors, with the deliberate decision of Congress to make the states subject to the statute, and finally with the enormous legislative record documenting the depth of the problem of disability discrimination, I find the second part of the *Kimel* approach to be satisfied for the ADA.

II

Given its conclusion about the Eleventh Amendment, the majority does not reach the last question that was presented in this case, which was whether the analysis that applies to an Eleventh Amendment argu-

ment directed at the general prohibition in the ADA against discrimination is different from the analysis appropriate to the accommodation provisions of the Act. Because I would reject the general Eleventh Amendment defense, I add a brief word on this point. In my view, because the accommodation duty and the duty to avoid discrimination are nothing more than two sides of the same coin, the answer is no.

The ADA defines discrimination to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless . . . [the] covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." 42 U.S.C. § 12112(b)(5)(A). The Act also provides that an employer may defend against a charge of discrimination by showing that its goals require discrimination—that they "cannot be accomplished by reasonable accommodation." 42 U.S.C. § 12113(a).

The University argues that this statutory accommodation process is unconstitutional under *Printz* v. *United States*, 521 U.S. 898, 117 S. Ct. 2365, 138 L.Ed.2d 914 (1997), because it violates the Tenth Amendment by forcing state officials to administer a federal regulatory scheme. In my view, however, the *Printz* model has no bearing on the question before us. The flaws the Court identified in *Printz* included the act of conscripting state officials to administer a federal program, the effective reallocation of duties from the branches of the federal government to which the Constitution assigned them to the state officials, and the conferral of policy-making authority on the state offi-

cials without adequate guidance. The *Printz* Court found that forcing the state to implement this type of regulatory system violated the principles of separation of powers and dual sovereignty. *Id.* at 922, 932, 930, 117 S. Ct. 2365.

The ADA does not establish anything like the regulatory scheme for handguns at issue in *Printz*. The ADA is instead a straightforward law prohibiting discrimination on the part of all employers, private and governmental alike, and defining the way the prohibition must be implemented. It provides the employers with precise definitions to follow: a reasonable accommodation is one tailored to the discrimination issue before the employer, which does not "impose an undue hardship on the operation [of the employer's business]." 42 U.S.C. § 12112(b)(5)(A). Unlike the regulatory system before the *Printz* Court, the ADA does not confer any special powers on employers in general or on state employers in particular. Employers are not administering a federal benefit by providing a reasonable accommodation; they are refraining from discrimination and to some degree taking preventative measures. There is no duty to accommodate that is separate from the general obligation to avoid discrimination against the disabled.

It bears repeating that, for this purpose, state employers stand in exactly the same position as private employers. As this court held in *Travis* v. *Reno*, 163 F.3d 1000, 1004-05 (7th Cir. 1998), federal law may pervasively regulate states as market participants; the anti-commandeering law of *Printz* only comes into play when the federal government calls on the states to use their sovereign powers to implement a federal regu-

latory program. In *Travis*, which came to the result later endorsed by the Supreme Court in *Reno* v. *Condon*, *supra*, we concluded that the Drivers Privacy Protection At (DPPA) did not violate the Tenth Amendment. The DPPA requires disclosure of certain records by the state, and so necessarily forces the state to come up with a system of determining which records should be disclosed, as well as how best to disclose them. The system was found constitutional because it affects states in their role as owners of databases, not in their role as governments. *Condon*, 120 S. Ct. at 672; *Travis*, 163 F.3d at 1004.

Though the ADA forces the states to comply with a federal regulation, it affects the states in their role as employers, not in their role as governments. Federal regulations of states acting as employers have been upheld in the past. In *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S. Ct. 1005, 83 L.Ed.2d 1016 (1985), the Court held that state employers may be forced to follow the federal Fair Labor Standards Act's wage and hour rules. Nothing in the recent line of Eleventh Amendment decisions undermines that rule. To the contrary, in *Alden* v. *Maine* the Court went out of its way to reaffirm that "[t]he constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law." 119 S. Ct. at 2266. Instead, the Court assumed that the states would ordinarily live up to their duties under federal law as a matter of good faith, and it noted that enforcement of federal obligations by the federal government remains permissible under the constitutional design. *Id.* at 2267. The fact of dual sovereignty does not, therefore, carry with it

any implication that states are allowed to disregard or to frustrate valid federal programs. See *City of New York* v. *United States*, 179 F.3d 29, 35 (2d Cir. 1999).

By defining discrimination in part as not making reasonable accommodations to disabled employees, the ADA does impose costs on employers, including the states. Employers must affirmatively act to alter any practices they have in place that discriminate against the disabled. Of course, this makes a great deal of sense. Just because an employer has a discriminatory practice, such as maintaining steep stairways or only offering breaks at wide intervals and therefore not allowing diabetics to take their medication, does not mean that the employer should be able to continue such a discriminatory practice without violating the ADA, any more than an employer's refusal in the past to construct a women's restroom would justify a refusal to hire female employees. The ADA allows an employer to adjust the workplace environment on a case-by-case basis, adopting only those changes that are reasonably necessary to refrain from discriminating against the disabled individual or individuals in question.

The ADA hardly broke new ground when it incorporated this type of affirmative duty. The Equal Protection Clause often requires states to take affirmative measures to eliminate or prevent discriminatory systems. For example, states with racially discriminatory reapportionment plans must redraw their congressional districts. See, *e.g.*, *Shaw* v. *Reno*, 509 U.S. 630, 652, 113 S. Ct. 2816, 125 L.Ed.2d 511 (1993) (holding that the state's reapportionment plan might violate the Equal Protection Clause). The logic of the University's argument here would, if taken to its limits, call into question

every affirmative injunction a court has ever entered to prevent threatened future violations of the constitutional guarantee of equal protection of the laws. Nothing in the Supreme Court decisions on which the University relies even hints at such a radical result. Similarly, the First Amendment guarantee of the right of free exercise of religion carries with it an implied duty on the part of the state to make reasonable adjustments. See, *e.g.*, *Sherbert* v. *Verner*, 374 U.S. 398, 403-04, 83 S. Ct. 1790, 10 L.Ed.2d 965 (1963); *Wisconsin* v. *Yoder*, 406 U.S. 205, 231, 92 S. Ct. 1526, 32 L.Ed.2d 15 (1972); *Church of the Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520, 546, 113 S. Ct. 2217, 124 L.Ed.2d 472 (1993); *Zorach* v. *Clauson*, 343 U.S. 306, 313-14, 72 S. Ct. 679, 96 L.Ed. 954 (1952). *Boerne* does not overrule these direct constitutional rulings.

Last, as I indicated above, I do not read any of the Supreme Court's recent decisions as overruling prior rulings that have upheld congressional legislation prohibiting measures with a discriminatory impact as valid exercises of the section 5 power. As the Eleventh Circuit explained in *Employment Discrimination*, "disparate impact analysis was designed as a 'prophylactic' measure." 198 F.3d at 1321 (citing *Connecticut* v. *Teal*, 457 U.S. 440, 449, 102 S. Ct. 2525, 73 L.Ed.2d 130 (1982), *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417, 95 S. Ct. 2362, 45 L.Ed.2d 280 (1975), and *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 435, 91 S. Ct. 849, 28 L.Ed.2d 158 (1971)). The Eleventh Circuit went on to explain that even though, in a disparate impact case, "the plaintiff is never explicitly required to demonstrate discriminatory motive, a genuine finding of disparate impact can be highly probative of the employer's motive since a racial 'imbalance is often a telltale sign of purposeful

discrimination.'" *Id.* (citing *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 339-40 n. 20, 97 S. Ct. 1843, 52 L.Ed.2d 396 (1977)). It found from this that the disparate impact provisions of Title VII are preventive rules that have the necessary congruence between the means used and the constitutional violation to be addressed (intentional discrimination). *Id.* at 1322. Nothing in *Kimel* comes close to suggesting that the Court was overruling this long line of its own authority, upon which the Eleventh Circuit carefully relied, and I am not prepared to take that step in the present case.

For all these reasons, I therefore respectfully dissent from the majority's conclusion that the Eleventh Amendment bars Erickson's suit against Northeastern University.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

No. 95 C 2451

MELINDA ERICKSON, PLAINTIFF-APPELLEE

v.

BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES FOR NORTHEASTERN ILLINOIS UNIVERSITY, DEFENDANT

[Sept. 30, 1998]

MEMORANDUM OPINION AND ORDER

NORDBERG, Senior J.

Plaintiff Melinda Erickson ("Erickson") seeks compensatory and punitive damages from her former employer, Northeastern Illinois University ("the University") pursuant to the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), and the American with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213. The basis of Erickson's complaint is that the University wrongfully terminated her on the basis of disability and a pregnancy-related condition. However, at this juncture, the case brings before the Court deeper questions concerning the nature of our federal system of gov-

ernment and forces us to consider the extent of Congress's power to abrogate a State's Eleventh Amendment immunity.

BACKGROUND

In November 1988, Erickson began working for the University, which is an arm of the State of Illinois. She held various positions within her former employer's organization until December 1993, when the University terminated her employment. On April 13, 1994, Erickson filed claims with the Equal Employment Opportunity Commission ("EEOC") and the Illinois Department of Human Rights, charging the University with discrimination on the basis of disability and a pregnancy-related condition. After receiving notice of the right to sue from the EEOC, Erickson filed her complaint against the University with the clerk of this Court. The University subsequently filed a motion to dismiss Erickson's ADA claim for lack of jurisdiction, based on the States' Eleventh Amendment immunity from suit. For the reasons set forth below, the Court denies Defendant's motion.

DISCUSSION

The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. While this text seems to limit only the federal courts' Article III power, the United States Supreme Court has long understood the Eleventh Amendment "to stand not so much for what it says, but for the presupposition . . .

which it confirms." *Blatchford* v. *Native Village of Noatok*, 501 U.S. 775, 779, 111 S. Ct. 2578, 2581, 115 L.Ed.2d 686 (1991). *See also Varner* v. *Illinois State University*, 150 F.3d 706, 708 (7th Cir.) (citing *Blatchford*). This presupposition is the precept inherent in our federal form of government that each state, although part of a union, is a sovereign entity. *Id.* (citing *Seminole Tribe* v. *Florida*, 517 U.S. 44, 54, 116 S. Ct. 1114, 134 L.Ed.2d 252 (1996)). "Accordingly, the States enjoy an immunity from suit in federal court by all private parties for all causes of action, including suits arising under federal statutes." *Id. See also Hans* v. *Louisiana*, 134 U.S. 1, 15, 10 S. Ct. 504, 507, 33 L.Ed. 842 (1890); *Doe* v. *University of Illinois*, 138 F.3d 653, 656-57 (7th Cir. 1998).

The Eleventh Amendment bar to suit is not absolute, however. States may consent to suit in federal court, and, under certain circumstances, Congress may abrogate the States' sovereign immunity. *Port Authority Trans-Hudson Corp.* v. *Feeny*, 495 U.S. 299, 304, 110 S. Ct. 1868, 109 L.Ed.2d 264 (1990). In the present case, the State of Illinois, represented by University, did not consent to be sued by Erickson. The only issue, therefore, is whether Congress validly abrogated the States' Eleventh Amendment immunity when it enacted the ADA.

Two recent Supreme Court cases, *Seminole Tribe* and *City of Boerne* v. *Flores*, — U.S. —, 521 U.S. 507, 117 S. Ct. 2157, 138 L.Ed.2d 624 (1997), have forced a number of courts to consider this very question. While the clear majority of circuit and district courts have concluded that the ADA constitutes an appropriate

congressional abrogation of States' immunity,[1] a significant minority has reached the opposite conclusion.[2] In the absence of a dispositive Seventh Circuit decision entered after *City of Boerne*, the Court now joins the debate.

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[1] See *Alsbrook* v. *City of Maumelle*, No. 97-1825, 1998 WL 598798 (8th Cir. Sept. 11, 1998); *Coolbaugh* v. *Louisiana*, 136 F.3d 430 (5th Cir. 1998); *Kimel* v. *Florida Board of Regents*, 139 F.3d 1426 (11th Cir. 1998); *Seaborn* v. *Florida Dep't of Corrections*, 143 F.3d 1405 (11th Cir. 1998); *Varner* v. *Illinois State University*, 150 F.3d 706 (7th Cir. 1998); *Clark* v. *California*, 123 F.3d 1267 (9th Cir. 1997); *Anderson* v. *Department of Public Welfare*, 1 F. Supp.2d 456, 468 (E.D. Pa. 1998); *Lamb* v. *John Umstead Hosp.*, No. 5:97CV-1019-BR3, 1998 WL 651142 (E.D. N.C. Sept. 1, 1998); *McGarry* v. *Director, Department of Revenue*, 7 F. Supp. 2d 1022 (W.D. Mo. 1998); *Meekison* v. *Voinovich*, No. 96 CV 00931, 1998 WL 543889 (S.D. Ohio Aug. 21, 1998); *Muller* v. *Costello*, 997 F. Supp. 299, 304 (N.D.N.Y. 1998) (stating that the clear majority holding in the circuits is that Congress validly enacted the ADA pursuant to § 5 of the Fourteenth Amendment); *Thorpe* v. *Ohio*, No. C-1-96-764, 1998 WL 612868 (S. D. Ohio Aug. 28, 1998); *Emma C.* v. *Eastin*, 985 F. Supp. 940 (N.D. Cal. 1997); *Martin* v. *Kansas*, 978 F. Supp. 992, 994 (D. Kan. 1997) (summarizing the majority position); *Zimmerman* v. *State of Or. Dep't of Justice*, 983 F. Supp. 1327 (D. Or. 1997) (dicta); *Wallin* v. *Minnesota Dep't of Corrections*, 974 F. Supp. 1234 (D. Minn. 1997); *Hunter* v. *Chiles*, 944 F. Supp. 914, 917 (S.D. Fla. 1996); *Niece* v. *Fitzner*, 941 F. Supp. 1497, 1503-04 (E.D. Mich. 1996).

[2] *Humenansky* v. *Regents of the University of Minnesota*, 152 F.3d 822 (8th Cir. 1998); *Nihiser* v. *Ohio Environmental Protection Agency*, 979 F. Supp. 1168 (S.D. Ohio 1997); *Pierce* v. *King*, 918 F. Supp. 932 (E.D.N.C. 1996) (dicta, decided before *Seminole Tribe*); *Garrett* v. *Board of Trustees*, 989 F. Supp. 1409 (N.D. Ala. 1998); *Brown* v. *North Carolina Division of Motor Vehicles*, 987 F. Supp. 451 (E.D.N.C. 1997). See also *Autio* v. *AFSCME, Local 3139*, 140 F.3d 802 (8th Cir. 1998), *reh'g granted and opinion vacated* (July 7, 1998).

Congress may validly abrogate State sovereign immunity under a federal statute such as the ADA if it unequivocally expresses its intent to do so and if it acts pursuant to a valid exercise of power. *See Seminole Tribe*, 517 U.S. at 55. In the present case, the University does not quibble over Congress's expressed intent to abrogate State immunity with the ADA, nor should it, as the statute is quite clear on this point. *See* 42 U.S.C. § 12202 ("A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter."). Instead, Defendant focuses on the second requirement and the supposed changes in Eleventh Amendment jurisprudence wrought by *City of Boerne*. In essence, the University argues that, after *City of Boerne*, the ADA is not a valid exercise of Congress's power under § 5 of the Fourteenth Amendment.

Section 5 provides that "Congress shall have power to enforce, by appropriate legislation, the provisions" of the Amendment, including the Equal Protection Clause. U.S. CONST. amend. XIV, § 5. The Equal Protection Clause forbids a State from "'deny[ing] to any person within its jurisdiction the equal protection of all the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L.Ed.2d 313 (1985) (internal citations omitted). "Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Katzenbach* v. *Morgan*, 384 U.S. 641, 651, 86 S. Ct. 1717, 16 L.Ed.2d 828 (1966). The

broad scope of this § 5 power allows Congress to enact "[w]hatever legislation is . . . adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion" as long as it is not prohibited. *Ex parte Virginia*, 100 U.S. 339, 345-346, 25 L.Ed. 676 (1879).

The Supreme Court in *Seminole Tribe* confirmed that valid legislation pursuant to § 5 could form the basis for congressional abrogation of States' sovereign immunity. 571 U.S. at 63-66. One year later, in *City of Boerne*, the Court refined its understanding of Congress's § 5 power when it examined the constitutionality of the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb to 2000bb-4. RFRA was a legislative response to *Employment Div., Dep't of Human Resources of Or.* v. *Smith*, in which the Supreme Court had held that the Free Exercise Clause did not require states to make exceptions to neutral and generally applicable laws that significantly burdened religious practices. *See* 494 U.S. 872, 887, 110 S. Ct. 1595, 1595, 108 L.Ed.2d 876 (1990). By enacting RFRA, Congress attempted to circumvent *Smith*'s holding. The crux of the statute was its requirement that laws substantially burdening the exercise of religion must be justified as the least restrictive means of furthering a compelling state interest. *See* 42 U.S.C. § 2000bb-1.

City of Boerne was the Supreme Court's response to Congress and RFRA. With that decision, the Court invalidated RFRA as an unconstitutional exercise of Congress' § 5 power. It determined that the statute

was "so out of proportion" to the problems it was intended to correct that it could not be viewed as "enforcing" the provisions of the Fourteenth Amendment. 117 S. Ct. at 2170. First, the Court found no "pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*." *Id.* at 2171. Second, it adjudged that RFRA imposed "the most demanding test known to constitutional law," creating a likelihood that the statute would invalidate many state laws. *Id.* Third, it held that RFRA "contradict[ed] vital principles necessary to maintain separation of powers and the federal balance." *Id.* at 2172. The statute was such a sweeping and direct response by Congress to the Court's interpretation of the First Amendment that it could be interpreted as an attempt to expand the substantive meaning of the Fourteenth Amendment. *Id.*

Central to the Supreme Court's conclusion that RFRA was unconstitutional was the use of the "congruence and proportionality" test. As the Court explained,

> [w]hile the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect.

Id. at 2164. Considering RFRA in light of this requirement, the Supreme Court observed that "RFRA's legislative record lacks examples of modern instances of

generally applicable laws passed because of religious bigotry." *City of Boerne*, 117 S. Ct. at 2169. Accordingly, the Court concluded that the requisite congruence and proportionality between RFRA and the injury Congress intended the statute to remedy or prevent did not exist.

Twenty-three days before *City of Boerne*, the Seventh Circuit found the ADA to be a valid exercise of Congress's Section 5 power, even though the statute forbade "a form of discrimination remote from the contemplation of the framers of the Fourteenth Amendment." *Crawford* v. *Indiana Dept. of Corrections*, 115 F.3d 481, 487 (7th Cir. 1997). While the appellate court has not yet had occasion to address the effects of *City of Boerne* on its Eleventh Amendment jurisprudence in the ADA context, it has done so in the contexts of both the Age Discrimination in Employment Act ("ADEA") and the Equal Pay Act ("EPA"). *See Varner* v. *Illinois State University*, 150 F.3d 706 (7th Cir. 1998)(EPA); *Goshtaby* v. *Board of Trustees of the University of Illinois*, 123 F.3d 427 (7th Cir. 1997) (ADEA).

In *Goshtaby*, after examining *City of Boerne*, the court concluded that the core analysis for determining whether Congress has overstepped the bounds of its section 5 enforcement authority was unchanged. *Goshtaby*, 123 F.3d at 769. "The critical question remains whether the act remedies constitutional violations or whether it imposes new substantive constitutional rights through legislation. Legislation which deters or remedies constitutional violations falls within 'the sweep of Congress' enforcement power.'" *Id.* (citing *City of Boerne*, 117 S. Ct. at 2163). Of course, the court also noted, "enforcing" a substantive constitu-

tional right is not the same as changing the nature of that right. For a statute to be preventative or remedial, congruence and proportionality must exist between the injury to be corrected and means employed to achieve that goal. *Id.*, 141 F.3d at 769 (citing *Boerne*, 117 S. Ct. at 2164).

In *Varner* v. *Illinois State University*, the appellate court again described the task of determining whether legislation is appropriate under Congress's section 5 power as dependent on whether that legislation "deters or remedies unconstitutional conduct." 150 F.3d at 715. Citing *City of Boerne*, the court explained that deterrent or remedial legislation may be valid "even if in the process it prohibits conduct which is not itself unconstitutional." *Id.* at 716. As in *Goshtaby*, the Seventh Circuit referred to the congruence and proportionality test as the marker of constitutional validity. *Id.* Critical to the *Varner* court's analysis of the EPA in light of the congruence and proportionality test was the fact that Congress had examined the amount and frequency of sex-based wage discrimination in the workplace as a preface to enacting the statute. *Id.* Furthermore, the Seventh Circuit accorded substantial deference to Congress's findings that extensive discrimination existed, since the legislature must have "wide latitude" to demarcate the line between substantive and remedial legislation. *Id.* (citing *Boerne*, 117 S. Ct. at 2164). The findings of substantial discrimination that undergirded the enactment of the EPA provided a significant contrast to the RFRA, which had a legislative record "devoid of any reference to modern examples of the kind of unconstitutional conduct purportedly targeted by the legislation." *Id.* at 716-17.

In this case, the University contends that, in light of *City of Boerne*, "the ADA's elevation of handicap discrimination to a status comparable to race and gender discrimination, in the absence of a history of state violations of the Equal Protection Clause, cannot be sustained as an exercise of Congress' Fourteenth Amendment enforcement power." (Defendant's Memorandum In Support Of Its Motion To Dismiss at 2.). However, the Court finds the ADA to be more analogous to the ADEA and EPA than to RFRA. Unlike RFRA, Congress did incorporate into the ADA modern instances of persistent discrimination suffered by individuals with disabilities. *See* 42 U.S.C. § 12101(a). The statute provides concrete and detailed information on the nature and extent of this discrimination "in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. § 12101(a)(3).

In addition, the ADA explicitly characterizes individuals with disabilities as "a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society . . . based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to society." *Id.* at § 12101(a)(7). Moreover, the statute's stated purpose is:

> (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

Id. at § 12101(b).

Based on these legislative expressions, the Court finds that the ADA is not analogous to RFRA. Consequently, the Court agrees with the Seventh Circuit's pre-*City of Boerne* reasoning in *Crawford* and considers that case to be consistent with the appellate court's later analysis of § 5 and State's immunity under the Eleventh Amendment as expressed in *Goshtaby* and *Varner*. In the absence of a more definitive statement from the Seventh Circuit or the United States Supreme Court, the Court finds that Congress legitimately abrogated the States' Eleventh Amendment immunity when it enacted the ADA pursuant to § 5 of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, the Court DENIES the University's motion to dismiss Erickson's [*sic*] for lack of jurisdiction and finds that Defendant is not immune, under the Eleventh Amendment, to a lawsuit brought

pursuant to the ADA. The Court sets a status hearing for October 15, 1998 at 3:00 p.m.

APPENDIX C

CONSTITUTION OF THE UNITED STATES

AMENDMENT XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

* * * * *

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. 12101:

§ 12101. Findings and purpose

(a) Findings

The Congress finds that–

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communica-

tion barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. 12102:

§ 12102. Definitions

As used in this chapter:

(1) Auxiliary aids and services

The term "auxiliary aids and services" includes—

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) Disability

The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

(3) State

The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

42 U.S.C. 12111:

§ 12111. Definitions

As used in this subchapter:

(1) Commission

The term "Commission" means the Equal Employment Opportunity Commission established by section 2000e-4 of this title.

(2) Covered entity

The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(3) Direct threat

The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) Employee

The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) Employer

(A) In general

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working

day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions

The term "employer" does not include-

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of title 26.

(6) Illegal use of drugs

(A) In general

The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act [21 U.S.C. § 801 *et seq.*]. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(B) Drugs

The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 U.S.C. § 812].

(7) Person, etc.

The terms "person", "labor organization", "employment agency", "commerce", and "industry affecting commerce", shall have the same meaning given such terms in section 2000e of this title.

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation

The term "reasonable accommodation" may include—

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and

other similar accommodations for individuals with disabilities.

(10) Undue hardship

(A) In general

The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—

(i) the nature and cost of the accommodation needed under this chapter;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal

relationship of the facility or facilities in question to the covered entity.

42 U.S.C. 12112:

§ 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes—

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an

organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration—

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a

class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) Covered entities in foreign countries

(1) In general

It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2) Control of corporation

(A) Presumption

If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is

engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) Exception

This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(C) Determination

For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on—

(i) the interrelation of operations;

(ii) the common management;

(iii) the centralized control of labor relations; and

(iv) the common ownership or financial control, of the employer and the corporation.

(d) Medical examinations and inquiries

(1) In general

The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

(2) Preemployment

(A) Prohibited examination or inquiry

Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry

A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment entrance examination

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if—

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that—

(i) supervisors and managers may be informed regarding necessary restrictions on the

work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

(4) Examination and inquiry

(A) Prohibited examinations and inquiries

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement

Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

42 U.S.C. 12113:

§ 12113. Defenses

(a) In general

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) Qualification standards

The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

(c) Religious entities

(1) In general

This subchapter shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to indi-

viduals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(2) Religious tenets requirement

Under this subchapter, a religious organization may require that all applicants and employees conform to the religious tenets of such organization.

(d) List of infectious and communicable diseases

(1) In general

The Secretary of Health and Human Services, not later than 6 months after July 26, 1990, shall—

(A) review all infectious and communicable diseases which may be transmitted through handling the food supply;

(B) publish a list of infectious and communicable diseases which are transmitted through handling the food supply;

(C) publish the methods by which such diseases are transmitted; and

(D) widely disseminate such information regarding the list of diseases and their modes of transmissability[1] to the general public.

Such list shall be updated annually.

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[1] So in original. Probably should be "transmissibility".

(2) Applications

In any case in which an individual has an infectious or communicable disease that is transmitted to others through the handling of food, that is included on the list developed by the Secretary of Health and Human Services under paragraph (1), and which cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling.

(3) Construction

Nothing in this chapter shall be construed to preempt, modify, or amend any State, county, or local law, ordinance, or regulation applicable to food handling which is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, which cannot be eliminated by reasonable accommodation, pursuant to the list of infectious or communicable diseases and the modes of transmissability[1] published by the Secretary of Health and Human Services.

42 U.S.C. 12114:

§ 12114. Illegal use of drugs and alcohol

(a) Qualified individual with a disability

For purposes of this subchapter, the term "qualified individual with a disability" shall not include any employee or applicant who is currently

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[1] So in original. Probably should be "transmissibility".

engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) Rules of construction

Nothing in subsection (a) of this section shall be construed to exclude as a qualified individual with a disability an individual who—

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs.

(c) Authority of covered entity

A covered entity—

(1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

(2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(3) may require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. § 701 *et seq.*);

(4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee; and

(5) may, with respect to Federal regulations regarding alcohol and the illegal use of drugs, require that—

(A) employees comply with the standards established in such regulations of the Department of Defense, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Defense);

(B) employees comply with the standards established in such regulations of the Nuclear Regulatory Commission, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any)

that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Nuclear Regulatory Commission); and

(C) employees comply with the standards established in such regulations of the Department of Transportation, if the employees of the covered entity are employed in a transportation industry subject to such regulations, including complying with such regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Transportation).

(d) Drug testing

(1) In general

For purposes of this subchapter, a test to determine the illegal use of drugs shall not be considered a medical examination.

(2) Construction

Nothing in this subchapter shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results.

(e) Transportation employees

Nothing in this subchapter shall be construed to encourage, prohibit, restrict, or authorize the oth-

erwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to—

(1) test employees of such entities in, and applicants for, positions involving safety-sensitive duties for the illegal use of drugs and for on-duty impairment by alcohol; and

(2) remove such persons who test positive for illegal use of drugs and on-duty impairment by alcohol pursuant to paragraph (1) from safety-sensitive duties in implementing subsection (c) of this section.

42 U.S.C. 12115:

§ 12115. Posting notices

Every employer, employment agency, labor organization, or joint labor-management committee covered under this subchapter shall post notices in an accessible format to applicants, employees, and members describing the applicable provisions of this chapter, in the manner prescribed by section 2000e-10 of this title.

42 U.S.C. 12116:

§ 12116. Regulations

Not later than 1 year after July 26, 1990, the Commission shall issue regulations in an accessible format to carry out this subchapter in accordance with subchapter II of chapter 5 of title 5.

42 U.S.C. 12117:

§ 12117. Enforcement

(a) Powers, remedies, and procedures

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

(b) Coordination

The agencies with enforcement authority for actions which allege employment discrimination under this subchapter and under the Rehabilitation Act of 1973 [29 U.S.C. § 701 et seq.] shall develop procedures to ensure that administrative complaints filed under this subchapter and under the Rehabilitation Act of 1973 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this subchapter and the Rehabilitation Act of 1973. The Commission, the Attorney General, and the Office of Federal Contract Compliance Programs shall establish such coordinating mechanisms (similar to provisions contained in the joint regulations promulgated by the Commission and the Attor-

ney General at part 42 of title 28 and part 1691 of title 29, Code of Federal Regulations, and the Memorandum of Understanding between the Commission and the Office of Federal Contract Compliance Programs dated January 16, 1981 (46 Fed. Reg. 7435, January 23, 1981)) in regulations implementing this subchapter and Rehabilitation Act of 1973 not later than 18 months after July 26, 1990.

* * * * *

42 U.S.C. 12202:

§ 12202. State immunity

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in[1] Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

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[1] "So in original. Probably should be "in a".

(2)

No. 99-2077

FILED

JUL 14 2000

CLERK

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

BOARD OF GOVERNORS OF
STATE COLLEGES AND UNIVERSITIES
FOR NORTHEASTERN ILLINOIS UNIVERSITY

MELINDA ERICKSON'S RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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7 pp

QUESTION PRESENTED

Whether Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. 12111-12117, is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING

Respondent, Melinda Erickson, was the plaintiff in the district court and an appellee in the Court of Appeals.

Petitioner is the United States of America, which intervened in the Court of Appeals to defend the constitutionality of Congress's abrogation of Eleventh Amendment immunity in the Americans with Disabilities Act of 1990, 42 U.S.C. 12202.

Respondent, Board of Governors of State Colleges and Universities for Northeastern Illinois University, was the defendant in the district court and the appellant in the Court of Appeals.

In the Supreme Court of the United States

No. 99-2077

UNITED STATES OF AMERICA, PETITIONER

v.

BOARD OF GOVERNORS OF
THE STATE COLLEGES AND UNIVERSITIES FOR
NORTHEASTERN ILLINOIS UNIVERSITY

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MELINDA ERICKSON'S RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Respondent, Melinda Erickson, hereby joins in supporting the Petition for a Writ of Certiorari previously filed by the United States of America in this matter.

STATEMENT

Respondent, Melinda Erickson, agrees with the statement of the United States of America as set forth in its Petition for a Writ of Certiorari in this matter.

REASON FOR GRANTING THE PETITION

On April 17, 2000, this Court granted review in *Board of Trustees of the University of Alabama v. Garrett*, No. 99-1240. The question concerning the Disabilities Act's abrogation of Eleventh Amendment immunity raised by this petition is identical to that presented in No. 99-1240. Accordingly, this petition should be held pending the Court's decision in that case.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Board of Trustees of Alabama* v. *Garrett*, No. 99-1240, and disposed of in accordance with the decision in that case.

Respectfully submitted.

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JULY 2000

Supreme Court, U.S.
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(3)

No. 99-2077

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES FOR NORTHEASTERN ILLINOIS UNIVERSITY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The Board of Governors of State Colleges and Universities for Northeastern Illinois University was an arm and agency of the State of Illinois and is the legal predecessor of the Board of Trustees of Northeastern Illinois University. The Board of Trustees of Northeastern Illinois University is also an arm and agency of the State of Illinois. The Board of Governors of State Colleges and Universities for Northeastern Illinois University was dissolved effective January 31, 1996 and the Board of Trustees of Northeastern Illinois University succeeded to all the rights and liabilities of that entity on January 1, 1996.

TABLE OF CONTENTS

Page

Parties to the Proceeding and Statement Pursuant to Rule 29.6 i

Table of Contents ii

Table of Authorities iii

Reasons for Denying the Writ 1

I. The United States Court Of Appeals For The Seventh Circuit Adhered To This Court's Decisions In *City of Boerne v. Flores; Florida Prepaid Postsecondary Education Expense Bd. v. College Savings Bank;* And *Kimel v. Florida Bd. of Regents* 1

A. For Purposes Of The Fourteenth Amendment, *Cleburne v. Cleburne Living Center, Inc.* Establishes That A Rational-Basis Test Applies To Distinctions Made Because Of Disability 2

B. Title I Of The Americans With Disabilities Act, 42 U.S.C. §§ 12111-17, Imposes Obligations On Employers Which Go Beyond A Rational-Basis Test And Does Not Therefore Enforce The Fourteenth Amendment 4

C. Title I Of The Americans With Disabilities Act, 42 U.S.C. §§ 12111-17, Is Not A Proportional Response To Identified Discrimination Against The Disabled By The State Of Illinois 5

II. The Sole Issue Presented By This Case Will Soon Be Resolved By This Court In *Board of Trustees of the University of Alabama v. Garrett,* No. 99-1240 8

Conclusion 9

TABLE OF AUTHORITIES

Page

CASES:

Alden v. Maine, 527 U.S. 706 (1999) 8

Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) 1

City of Boerne v. Flores, 521 U.S. 507 (1997) 1, 3

City of Cleburne v. Cleburne Living Ctr., Inc., 437 U.S. 432 (1985) 2, 3

Civil Rights Cases, 109 U.S. 3 (1883) 1

Erickson v. Board of Governors of State Colleges and Univs. for Northeastern Ill. Univ., 207 F.3d 945 (7th Cir. 2000) 3, 4, 8

Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999) 1, 3, 5, 8

Garrett v. University of Ala. at Birmingham Bd. of Trustees, 193 F.3d 1214 (11th Cir. 1999), *cert. granted*, 120 S.Ct. 1669 (U.S. Apr. 17, 2000) (No. 99-1240) 9

Gregory v. Ashcroft, 501 U.S. 452 (1991) 2

Kimel v. Florida Bd. of Regents, 139 F.3d 1426 (11th Cir. 1998) 8

Kimel v. Florida Bd. of Regents, 120 S. Ct. 631 (2000) 1, 3, 5

New York v. United States, 505 U.S. 144 (1992) 2

Oregon v. Mitchell, 400 U.S. 112 (1970) 1

Seminole Tribe v. Florida, 517 U.S. 44 (1996) 2

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS AND STATUTES:

U.S. Const. amend. XIV, § 1 3

U.S. Const. amend. XIV, § 5 ..... 2, 3, 5, 8, 9

Ill. Const. art. 1, § 19 6

Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* 1, 5, 8

42 U.S.C. § 12202 2

Illinois Human Rights Act, 775 Ill. Comp. Stat. Ann. § 5/1-101 *et seq.* 6

775 Ill. Comp. Stat. Ann. § 5/1-103(I) 7

775 Ill. Comp. Stat. Ann. § 5/2-101(B)(1)(c) 7

Ill. Rev. Stat. (1921), ch. 23, § 350 *et seq.* 6

Ill. Rev. Stat. (1921), ch. 23, § 357(m) 6

Ill. Rev. Stat. (1957), ch. 24½, § 38b1 *et seq.* 6

Ill. Rev. Stat. (1957), ch. 24½, § 38b3(9) 6

Ill. Rev. Stat. (1975), ch. 38, § 65-21 *et seq.* 6

Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.* 4

CONGRESSIONAL HISTORY:

S. Rep. No. 101-116 (1989) 7

MISCELLANEOUS:

R. Davis, *The Illinois Human Rights Act: Revision Of Illinois Law Concerning Discrimination*, 69 Ill. Bar J. 218 (1980) 7

REASONS FOR DENYING THE WRIT

The sole question presented by the Petition of the United States is whether Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12111-17, is a proper exercise of Congress's power under section 5 of the Fourteenth Amendment.

I.

The United States Court Of Appeals For The Seventh Circuit Adhered To This Court's Decisions In *City of Boerne v. Flores; Florida Prepaid Postsecondary Education Expense Bd. v. College Savings Bank;* And *Kimel v. Florida Bd. of Regents.*

The Eleventh Amendment divides power vertically between the state and federal governments. *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 242 (1985). The *Civil Rights Cases,* 109 U.S. 3 (1883) teach us that the Fourteenth Amendment gives Congress the power solely to enforce Constitutional guarantees against the states. Congress's power to enforce is not a power to expand Constitutional guarantees without following the process of amending the Constitution. To paraphrase, "[f]rom the standpoint of the . . . constitutional structure of this Nation, [the ADA] bring[s] us to a pause before we [are carried] to the point of sanctioning Congress's attempt to expand the scope of constitutional rights 'by simple legislation.' " *Oregon v. Mitchell,* 400 U.S. 112, 152 (1970). Because of the divide between the separate sovereign states and the sovereignty of the states as united states "every school child learns, our Constitution establishes a system of dual

sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

To put it in a way that seems particularly applicable to the Americans with Disabilities Act of 1990, "the Constitution protects us from our own best intentions. It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *New York v. United States*, 505 U.S. 144, 187 (1992). The divide between dual sovereigns may only be breached when Congress has both unequivocally expressed its intent to cross the divide and acted pursuant to a valid exercise of power. *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). Although Congress did unequivocally express its intent to abrogate the Eleventh Amendment in 42 U.S.C. § 12202, as the Seventh Circuit correctly held in this case, Congress failed to act pursuant to a valid exercise of its power under section 5 of the Fourteenth Amendment. The reasons why the Seventh Circuit's decision was correct follow.

A. For Purposes Of The Fourteenth Amendment, *Cleburne v. Cleburne Living Center, Inc.* Establishes That A Rational-Basis Test Applies To Distinctions Made Because Of Disability.

The decision of the Seventh Circuit in this case was informed by the three recent decisions of this Court addressing the circumstances under which Congress may properly act in exercise of its legislative power under section 5 of the Fourteenth Amendment: *Kimel v. Florida*

Bd. of Regents, 120 S. Ct. 631 (2000); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999); and *City of Boerne v. Flores*, 521 U.S. 507 (1997). In *City of Boerne*, this Court wrote that "[a]ny suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law. *City of Boerne v. Flores*, 521 U.S. at 527. This observation was repeated in *Kimel* and *Florida Prepaid Postsecondary Educ. Expense Bd.* In its decision, the Seventh Circuit recognized that "[t]hrice [the Supreme Court] has stressed that the language of § 5, which gives Congress the power to 'enforce' the Fourteenth Amendment, must be taken seriously. Statutes that create new rights, or expand old rights beyond the Fourteenth Amendment's bounds, do not 'enforce' that amendment." *Erickson v. Board of Governors of State Colleges and Univs. for Northeastern Ill. Univ.*, 207 F.3d 945, 947 (7th Cir. 2000).

The outer bounds of Congress's power to treat the disabled as entitled to equal protection under section 1 of the Fourteenth Amendment was set in *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442 (1985) where this Court concluded for several reasons "that the Court of Appeals erred in holding mental retardation a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation." A rational-basis test applies to distinctions made because of disability. Just as in *Kimel* concerning distinctions based on age, Congress does not have the naked power *vis-a-vis* the states to legislate a stricter standard of conduct than required by the Equal Protection Clause. Rational distinctions because of disabilities comport with the Constitution.

B. Title I Of The Americans With Disabilities Act, 42 U.S.C. §§ 12111-17, Imposes Obligations On Employers Which Go Beyond A Rational-Basis Test And Does Not Therefore Enforce The Fourteenth Amendment.

The ADA imposes a higher standard than the Constitutionally mandated rational-basis test. It imposes an affirmative duty on the states *qua* employers to reasonably accommodate disabled persons and persons perceived to be disabled within the meaning of that Act. The ADA mandates an affirmative justification for state action. The employment decisions of the State of Illinois are no longer presumptively valid if they are rationally related to the interests at stake. State employees are compelled to implement the reasonable accommodation process imposed by that Act. Only when the State of Illinois shows that it cannot reasonably accommodate a disabled person will it be free from the restrictions of the ADA.

As noted by the Seventh Circuit by requiring that employers accommodate rather than disregard disabilities, the ADA is a cousin to the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb *et seq.* "Both the RFRA and the ADA replace the Constitution's approach with a prohibition of disparate impact and jettison neutrality in favor of accommodation." *Erickson v. Board of Governors of State Colleges and Univs. for Northeastern Ill. Univ.*, 207 F.3d at 951. The ADA's approach is harder to justify than the approach of RFRA because unlike the Free Exercise Clause, the Equal Protection Clause does not prohibit all intentional discrimination

but only discrimination that cannot pass the rational-basis test.

C. Title I Of The Americans With Disabilities Act, 42 U.S.C. §§ 12111-17, Is Not A Proportional Response To Identified Discrimination Against The Disabled By The State Of Illinois.

Section 5 of the Fourteenth Amendment is an affirmative grant of power to Congress. *See Kimel v. Florida Bd. of Regents*, 120 S.Ct. 631, 644 (2000). Congress could have acted to impose the ADA on the State of Illinois pursuant to the enforcement power of section 5 of the Fourteenth Amendment if there had been a factually based legislative finding that Illinois as a sovereign state was evading the rational-basis test in a way that justified the prophylactic measures of that Act. Decades of legislative experience, years of hearings and study, task forces, surveys and numerous citizen testimonials about discrimination in the private sector are not substitutes for evidence of discrimination by the states. Had there been such evidence the ADA might have been considered a proportional response to invidious conduct. The propriety of any section 5 legislation is judged with reference to historical experience. *See Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 640 (1999). However, the ADA lacks proportionality because the State of Illinois has no legislatively documented history of discrimination against the disabled.

For at least seven decades prior to the ADA Illinois had taken a proactive role with respect to the disabled. In

1919, Illinois adopted an Act in relation to the rehabilitation of physically handicapped persons. Ill. Rev. Stat. (1921), ch. 23, § 350 *et seq.* Among other things, that Act required the Illinois Department of Public Welfare to cooperate with the Illinois Department of Labor in the placement in remunerative employment of physically handicapped persons. Ill. Rev. Stat. (1921), ch. 23, § 357(m). In 1955, Illinois adopted a University Civil Service System. Ill. Rev. Stat. (1957), ch. 24½, § 38b1 *et seq.* Among other things, that Act required the University Civil Service System to provide by its rules for employment at regular rates of compensation physically handicapped persons in positions in which the handicap did not prevent the individual from furnishing satisfactory service. Ill. Rev. Stat. (1957), ch. 24½, § 38b3(9). In 1970, Illinois adopted a new constitution. Article 1, § 19 of the Illinois Constitution provides that: "All person with physical or mental handicap shall be free from discrimination in the sale or rental of property and shall be free from discrimination unrelated to ability in the hiring and promotion practices of any employer." Ill. Const. art. 1, § 19. No other state had a comparable constitutional provision in 1970.

Nearly twenty years before the adoption of the ADA Illinois adopted its Equal Opportunity for the Handicapped Act. Ill. Rev. Stat. (1975), ch. 38, § 65-21 *et seq.* That Act made it unlawful for any employer to discriminate in hiring, discharge, or otherwise against any person because of a physical or mental handicap. Ill. Rev. Stat. (1975), ch. 38, § 65-25. Ten years prior to the adoption of the ADA Illinois consolidated numerous pre-existing

anti-discrimination laws and created a uniform enforcement procedure. *See* R. Davis, *The Illinois Human Rights Act: Revision Of Illinois Law Concerning Discrimination*, 69 Ill. Bar J. 218 (1980). Illinois' new law is known as the Illinois Human Rights Act. 775 Ill. Comp. Stat. Ann. § 5/1-101 *et seq.* That Act prohibits discrimination against persons with determinable physical or mental characteristics, a history of such characteristics, or when there is a perception of such characteristics by the person complained against. 775 Ill. Comp. Stat. Ann. § 5/1-103(I). The State of Illinois and its political subdivisions, municipal corporations and other governmental units and agencies, without regard to the number of persons they employ, are all subject to the provisions of that Act. 775 Ill. Comp. Stat. Ann. § 5/2-101(B)(1)(c).

That the State of Illinois was far ahead of Congress in providing constitutional and statutory protections for the disabled is not a unique circumstance. The legislative history of the ADA unequivocally establishes that similar conditions existed in virtually all the states. A Senate Report remarked that "[v]irtually all States prohibit unfair discrimination among persons of the same class and equal expectation of life." S. Rep. No. 101-116, at 84 (1989). That Senate Report noted that "[a]ll states currently mandate accessibility in newly constructed state-owned public buildings. . . . " *Id.* at 92. That Congress thought it important to provide a uniform remedy as an alternative to the multiple remedies provided by the states is not a sufficient justification for abrogation of the Eleventh Amendment. Different state remedies addressing a core social problem are common. What is unique is that Congress would use a history of proactive conduct

and multiple remedies provided by the states as a justification for circumventing the Eleventh Amendment. The goal of providing a uniform remedy does not have a foundation in the Fourteenth Amendment.

This is not to suggest that section 5 of the Fourteenth Amendment requires that egregious predicates exist before Congress may exercise its power. However, the resulting statute must be narrowly tailored to remedy a state's failing. *See Florida Prepaid,* 527 U.S. at 639. The decision of the Seventh Circuit correctly states that the legislative findings of the ADA (42 U.S.C. § 12101) contain not a word about state governments. Nothing in the legislative findings or the debates preceding adoption of the ADA shows that Illinois, or any other state government, engaged in practices that prevented victims of irrational discrimination from obtaining a remedy. *Erickson,* 207 F.3d at 951-52. To enforce a federal law against Illinois in federal courts when Illinois has a history of protecting the disabled is to defy logic. To find that Congress could use its section 5 power despite the proactive efforts of the State of Illinois would only heighten "lingering concerns about the extent of the national power." *Alden v. Maine,* 527 U.S. 706, 713-14 (1999).

II

The Sole Issue Presented By This Case Will Soon Be Resolved By This Court In *Board of Trustees of the University of Alabama v. Garrett,* No. 99-1240.

The reason for granting the Petition proffered by the United States is that this Court has granted review in

Garrett v. University of Ala. at Birmingham Bd. of Trustees, 193 F.3d 1214 (11th Cir. 1999), *cert. granted*, 120 S.Ct. 1669 (U.S. Apr. 17, 2000) (No. 99-1240), concerning the same issue presented here. The decision of the United States Court of Appeals for the Eleventh Circuit in *Garrett* mistakenly followed its decision in *Kimel v. Florida Bd. of Regents*, 139 F.3d 1426, 1433 (11th Cir. 1998), *rev'd*, 120 S.Ct. 631 (2000), holding that Congress properly exercised its power under section 5 of the Fourteenth Amendment in adopting the ADA. In this case, the Seventh Circuit correctly held that Congress did *not* properly exercise its power under section 5 of the Fourteenth Amendment. When this Court reverses *Garrett* there will be nothing more to add by reviewing this case.

CONCLUSION

For the foregoing reasons, the Respondent urges this Court to deny issuance of a writ of certiorari.

Respectfully submitted,

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